IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-257

RUBATEX CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SHAWE & ROSENTHAL,
EARLE K. SHAWE,
CARROL HAMENT,
ERIC HEMMENDINGER,
Sun Life Building,
Charles Center,
Baltimore Maryland 21201,
(301) 752-1040.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Contents of Appendix

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

RUBATEX CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Rubatex Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on June 29, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is reported at 101 LRRM 2660. The Decision and Order of the National Labor Relations Board (App. 11) is reported at 235 NLRB No. 113, 97 LRRM 1534.

JURISDICTION

The Judgment sought to be reviewed was entered by the Court of Appeals on June 29, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board exceeded its authority (limited to non-punitive remedies) by requiring an employer to make payments to 817 strikers corresponding to "bonuses" paid, subsequent to a strike, to 13 non-striking bargaining unit employees.

STATUTES INVOLVED

The National Labor Relations Act, as amended, Sections 8(a)(1), and 10(c), 29 U.S.C. §§ 158(a)(1), and 160(c) (App. 23).

STATEMENT OF THE CASE

I.

The Board's Findings of Facts

Rubatex Corporation produces rubber products at its plant at Bedford, Virginia. The Company's 830 production and maintenance workers are represented by the United Rubber, Cork, Linoleum and Plastic Workers of America, Local 240, AFL-CIO.

A collective bargaining agreement between the Company and the Union expired on August 31, 1976. Negotiations for a new contract reached an impasse and a strike began on September 1, 1976. The Company continued operations throughout the strike using supervisory personnel, non-bargaining unit employees, and 13 bargaining unit members who chose to work during all or part of the strike.

Settlement of the strike was reached on October 25, 1976. The settlement included a 10% general wage increase. Bargaining unit employees returned to work on October 26, 1976. An injunction regulating picketing had been issued during the strike by the Circuit Court of Bedford County, Virginia.

On November 22, 1976, almost a month after the end of the strike, and without previous announcement, the

Company made monetary payments to employees who worked during the strike, including the 13 bargaining unit members. Of the latter, nine who had worked throughout the entire strike received $100 each and the four who worked proportionately less time than the others received $25 each.

A letter from the Company president dated November 22, 1976, accompanying each payment, stated that the payment was a small token of the Company's appreciation for the employees' effort in keeping the plant in operation during the course of the strike which, the letter pointed out, "could have meant the difference between the plant being in operation now [i.e., subsequent to the strike] and not being in business if we had shut the plant down entirely for two months."

These factual findings were based on a stipulated record and were not disputed. (App. 13-14).

II.

The Board's Decision and Order

Based on the foregoing facts, the Board concluded that the Company violated Section 8(a)(1) of the National Labor Relations Act by giving the post-strike bonus to 13 of the 830 bargaining unit members. The Board's finding was based solely on the theory, first articulated in *Aero-Motive Manufacturing Company*, 195 NLRB 790 (1972), *enf'd* 475 F.2d 27 (6th Cir. 1973) that post strike payments to non-striking bargaining unit employees discourage employees from engaging in protected strike activity in the future, because they act as an implicit promise of future benefit. The Board also found that the Company violated Section 8(a)(5) of the Act by failing to negotiate with the Union prior to granting the bonus, and by failing to supply the Union with requested information thereafter.

As a remedy for the 8(a)(1) violation, the Board ordered the Company to pay $100 plus interest to each

of the bargaining unit employees who had not received a post-strike payment, and $75 plus interest to each of the four bargaining unit employees who received $25, for a total payment of $82,000, plus interest.[1] The Board further ordered the Company to cease and desist from granting such bonuses in the future, to cease and desist from refusing to bargain or provide information to the Union respecting such bonuses, and to post the customary notices.

The Board's remedial order was based on its conclusion that the "only practical method . . . . of restoring the statutorily required equality of treatment" between strikers and non-strikers was payment of an equivalent bonus to the strikers. (App. 19). The Board dismissed in a footnote the Company's argument that the remedy, some 82 times larger that the illegal bonuses, was punitive and oppressive, stating, "There is nothing burdensome or punitive about this since we order no payment beyond what is necessary to restore equality between those unit employees who participated in the strike and those who did not." (App. 19). The Board does not, in its decision, discuss the alternative of simply issuing a cease and desist order, without monetary payments, which, the Company had argued, would be a completely effective cure to the implicit promise of future benefit which the Board had found to be the essence of the violation.

III.

The Judgment of the Court of Appeals

The United States Court of Appeals for the Fourth Circuit upheld the Board's finding that the Company violated Section 8(a)(1) and 8(a)(5) of the Act.[2]

[1] These are net figures and do not include legally required withholding and deductions. Total cost to the Company of the Board's order would be in excess of $100,000, plus interest.

[2] The Petitioner is not requesting review of these determinations in order to focus on the issue raised by the monetary remedy.

As to the remedy ordered by the Board, the Court of Appeals began, "The propriety of the remedy adopted by the Board presents greater difficulty." (App. 6). In the Court of Appeals' view, the case presented three possible remedies:

1. A cease and desist order alone.
2. Rescission of the bonus.
3. Payment of the bonus to those who did not receive it.

Rescission was rejected as impractical, and possibly resulting in greater discord. A cease and desist order, the Court stated, "might well be ineffective in dispelling the apprehensions of those employees who are aware that non-strikers were treated more favorably in the past and know of no restriction on the company's ability to engage in the same behavior in the future." (App. 7). Thus, the Court concluded, "payment of an equivalent bonus to the striking employees would seem to be the most effective and least disruptive of the alternatives." (App. 7).

In closing, the Court stated since that none of the three remedies was completely satisfactory, it was unable to hold that the Board abused its discretion in adopting the third alternative. Acknowledging that the amount involved "is not inconsequential," the Court concluded by stating that in the absence of evidence that payment of the required sum would have a substantial adverse effect upon the company, it would not say that the payment was excessive. (App. 7).

Judge Harvey dissented on the remedy, stating that the Board's order "is oppressive under the circumstances of this case, and amounts to the imposition of a punitive fine." (App. 9) The appropriate remedy, he wrote, would have been a cease and desist order alone, which would inhibit any future payment to non-strikers, and make it quite apparent that if the violation

were repeated, the Company could be punished for contempt of Court.

Judge Harvey also found no significance in the Company's failure to prove that the ordered payment would adversely affect it, writing that "$82,000 is concededly a substantial sum, particularly when considered in relation to the $1,000 paid here as bonuses." (App. 10).

On July 17, 1979, the Court of Appeals issued a stay of its mandate in this case, pending filing of a petition for a writ of certiorari.

REASONS THE WRIT SHOULD BE GRANTED

This case represents an undisguised attempt by the Board to extend its authority beyond that specifically mandated by this Court, by assuming the right to impose punitive remedies.

It is inescapable that the award ordered by the Board in this case is punitive in nature. As a remedy for the Company's payment of a total of $1,000 to 13 bargaining unit employees, the Board has ordered the Company to pay some $82,000, plus interest, to 817 employees who took no risks and performed no services to the Company during the strike. No "make whole" purpose is served — the remedy is nothing more than a fine designed to enhance deterrence.

Moreover, the monetary remedy is totally unnecessary to cure the effect of the violation. The Board, in its decision, stated that the wrongful effect of the payments was the implicit promise of future benefit to employees who refrained from protected activity. The Board did not treat the case as one of discrimination under Section 8(a) (3) of the Act, or find that any person had been deprived of an entitlement or earning opportunity on account of the violation.

[3] 29 U.S.C. § 158(a)(3).

Thus, had the Board viewed the remedy in terms of its own implicit promise theory, it would have been forced to squarely confront the fact that a posted cease and desist order would have completely dispelled any future implicit promise, and would have been a sufficient remedy, consistent with the Board's traditional treatment of 8(a) (1) violations.

Instead, to justify its remedy, the Board speaks "of restoring the statutorily required equality of treatment," thus appealing to a fanciful notion of symmetry of treatment, while glossing over the fact that the remedy is not necessary to prevent the future interference found by the Board to be the vice arising from the bonus. (App. 19).

The Court of Appeals erred in deferring to the Board's remedy, based upon the reasoning that "a cease and desist order, even if posted, might well be ineffective in dispelling the apprehensions of those employees who are aware that non-strikers were treated more favorably in the past." (App. 7).

As Judge Harvey pointed out in his dissent, the assumption that a cease and desist order might be ineffective is simply wrong; a posted order would make it abundantly clear that a repetition of the payments would expose the company to the penalties for contempt of court. Moreover, this is not the case of flagrant, or even of intentional interference with protected rights. There was no evidence of animus, and a company with an anti-union motivation would hardly have waited until the strike was settled to pay bonuses. There is no reason to suspect that the Company would not give a cease and desist order its utmost respect.

The majority of the Court of Appeals errs still further when it assumes that employees "would know of no restriction" on the Company's future conduct, completely ignoring the very cease and desist order it was in the midst of discussing. (App. 7).

Apart from the illogic of the Court's conclusion, its discussion makes clear what the Board, perhaps disingenuously, avoided saying, that the sole rationale for the Board's remedy is deterrance, piling monetary payments upon the supposedly "ineffective" cease and desist order, in order to allay apprehensions of repetition.[4]

Thus, the Board's remedy flies in the face of the Supreme Court's decision in *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7 (1940), in which the Court condemned the sort of reasoning followed in this case, stating,

> It is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end. 311 U.S. at 12.

A long line of Supreme Court cases further confirms that Board orders may not be punitive, but must be appropriately restorative. For example, in *Consolidated Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197 (1938), the Court held that

> The power [of the Board] to command affirmative action is remedial not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violations where those consequences are of a kind to thwart the purposes of the Act. 305 U.S. at 236.

[4] The punitive nature of the remedy is further revealed by the Court of Appeals' comment that absent evidence of adverse effect on the Company, it would not say the remedy was excessive. If the remedy were backpay, ability to pay would be viewed as irrelevant. Inability to pay is hardly an excuse for illegally depriving a person of his livelihood. By raising the question of ability to pay, the Court has introduced an element foreign to backpay remedies, belonging more properly to criminal proceedings, in which ability to pay may affect the imposition of fines.

See also, *Virginia Electric Power Co. v. N.L.R.B.*, 319 U.S. 533 (1943); *Carpenters, Local 60 v. N.L.R.B.*, 365 U.S. 651 (1961); *International Brotherhood of Electrical Workers v. Foust*, 47 U.S.L.W. 4600 (1979).

In *N.L.R.B. v. Seven Up Bottling Co. of Miami*, 344 U.S. 344 (1953), Justice Frankfurter, not content with the terminology of "remedial" and "punitive", which he viewed as a "bog of logomachy," restated the Board's powers:

> This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act. 344 U.S. at 349.

The Supreme Court has further made it clear that the Board is not to be given a free hand in applying these principles. In *Detroit Edison Co. v. N.L.R.B.*, 99 S. Ct. 1123 (1979), the Court wrote:

> The rule of deference to the Board's choice of remedy does not constitute a blank check for arbitrary action. The role that Congress in § 10(e) has entrusted to the Courts in reviewing the Board's petitions for enforcement of its orders is not that of passive conduit. 99 S. Ct. at 1132.

Accordingly, we submit, the Court of Appeals erred in deferring to the Board's remedial order, the sole purpose of which is to defer future violations by imposing a tremendous and disproportionate penalty upon the Company.

The Board's own precedent demonstrates the unusual and unjustified nature of the remedy in this case. Board financial remedies have fallen into three categories: backpay (including fringe benefits) awarded for loss of

earnings opportunities, usually in discharge cases;[5] restitution of illegally obtained union dues;[6] and payment of legal fees and organizing expenses, which is ordered in unusual cases involving flagrant unlawful conduct.[7] These are all remedies designed to "make whole" for lost earning opportunities, or expenditures caused by unlawful behavior.

In cases of interference with protected rights under Section 8(a)(1), the Board has traditionally and appropriately relied virtually exclusively upon cease and desist orders. Morris ed. THE DEVELOPING LABOR LAW (BNA 1971) at 583; McDowell and Huhn, N.L.R.B. REMEDIES FOR UNFAIR LABOR PRACTICES (Wharton School 1976) 6-31. Thus, in a typical case involving a violation of section 8(a)(1) the Board stated:

> The Respondent has committed other and serious unfair labor practices, organizational activities continue at the Respondent's plant, and we cannot be sure that, in these circumstances, such surveillance will not again occur. Therefore, in order to assure the employees that their activities will not again be subject to such illegal observation, we shall direct the respondent to cease and desist therefrom. *Luxuray of New York* 185 NLRB 100 (1970).

It is ironic that the Board used virtually the same language and reasoning in this case, yet directed not only a cease and desist order, but also $82,000 in payments.

Even in cases involving compelling circumstances, the Board has traditionally refrained from ordering

[5] A backpay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice. *Nathanson v. N.L.R.B.*, 344 U.S. 25, 27 (1952).

[6] *Carpenters, Local 60 v. N.L.R.B., supra; Virginia Electric and Power Co. v. N.L.R.B., supra.*

[7] *N.L.R.B. v. Food Store Employees, Local 347*, 417 U.S. 1 (1974).

monetary payments. For example, in *Union de Tronquistas, Local 901,* 202 NLRB 399 (1973), the Board rejected the trial examiner's order that the union pay compensation to employees who were deprived of earnings opportunities as a result of union violence. Finding such violence to be illegal, the Board nonetheless limited its remedy to a cease and desist order stating,

> The Board has refrained from directing an otherwise appropriate remedy where practical and economic considerations dictated a lesser deterrent. 202 NLRB 399.

The remedy in this case thus stands sharply contrasted from precedent, and is a venture into a new area of punitive remedies for 8(a)(1) violations, an area which prior cases would indicate is out of bounds. This development has not been free from controversy. In the *Aero-Motive* Board decision, the forerunner of this case, Board Member Kennedy dissented from the Board's basic theory, finding that post strike payments to nonstrikers would have so slight an effect as to be de minimus. He would have ordered no remedy at all. 195 NLRB at 795. The Court of Appeals for the Sixth Circuit enforced the Board's order in *Aero-Motive*, but only "reluctantly", and over the dissent of Chief Judge Phillips. 475 F.2d at 27. In this case, Judge Harvey has written a strong and well reasoned dissent, exposing the punitive nature of the Board's remedy.

The question presented by this case is not isolated, or limited to its facts. It demonstrates the tendency of administrative agencies to build upon precedent in expanding their powers. The precedential value of cases such as this is particularly great for the Board, which utilizes its decisions in lieu of rulemaking under the Administrative Procedure Act.[8] *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1961). It therefore cannot be

[8] 5 U.S.C § 551 *et seq.*

expected that this case would be limited to its facts in future applications. More likely, it would serve the Board as a basis for expanding its intrusion into the area of punitive remedies. The precedential value of the case thus provides additional justification for Supreme Court review.

CONCLUSION

In conclusion, we submit that the Board has clearly abused its discretion and exceeded its lawful powers in this case by fashioning a punitive remedy. This raises a substantial question involving the enforcement of the National Labor Relations Act — whether the Board has the power to impose financial penalities solely in order to deter future violations of the Act. Because of the importance of this issue, we respectfully request that the writ of certiorari be issued.

Respectfully submitted,

SHAWE & ROSENTHAL,
EARLE K. SHAWE,
CARROL HAMENT,
ERIC HEMMENDINGER,
Sun Life Building,
Charles Center,
Baltimore Maryland 21201,
(301) 752-1040.

August, 1979

United States Court of Appeals
For The Fourth Circuit

No. 78-1341

National Labor Relations Board,
Petitioner,
v.
Rubatex Corporation,
Respondent.

Application for enforcement of an order of the National Labor Relations Board.

Argued March 16, 1979 *Decided June 29, 1979*

Before Winter and Hall, Circuit Judges, and Harvey, District Judge.*

Barbara Gehring, National Labor Relations Board (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Howard E. Perlstein, National Labor Relations Board, on brief) for Petitioner; Warren M. Davison and Carrol Hament (Earle K. Shawe, Eric Hemmendinger, Shawe & Rosenthal, on brief) for Respondent.

WINTER, Circuit Judge:

The National Labor Relations Board seeks enforcement of its order finding Rubatex Corporation in

* Alexander Harvey, II, United States District Judge for the District of Maryland, sitting by designation.

violation of §§ 8(a)(1) and (5) of the National Labor Relations Act and prescribing certain injunctive and monetary relief. Having concluded that substantial evidence in the record as a whole supports the conclusion that unfair labor practices were committed and that the remedy imposed was not an abuse of discretion, we grant enforcement of the Board's order.

I.

The essential facts have been stipulated. Rubatex, a Virginia corporation, is engaged in the manufacture of rubber products at its Bedford, Virginia, facility. At all times material to this litigation, the company has recognized the United Rubber, Cork, Linoleum and Plastic Workers of America, Local 240, AFL-CIO, as the collective bargaining representative of all of its production and maintenance employees. The collective bargaining agreement between the company and the union expired August 31, 1976. Since negotiations for a new contract had reached an impasse, a strike began the following day. On this date, there were approximately 830 employees in the bargaining unit.

Rubatex was able to continue its operations throughout the strike with the aid of supervisory personnel, non-union employees, and thirteen union members who chose to work. The strike ended on October 25, 1976, when a new agreement was executed. A month later, without notice to the union, the company paid a bonus to all employees who worked during the strike, including the thirteen union members. Of the thirteen, nine who worked throughout the strike received $100 each, and four who worked proportionately less time received $25 each.[1] No payments were made to the 817 union employees who participated in the strike. At a subsequent meeting between the company and the union, the union requested certain information about the payments and questioned their legality. Although

[1] Two-hundred and forty of the non-union or supervisory employees who worked during the strike received $100 each, three received $50 each, and one was paid $75.

the company representative said that he would check into the payments, no response was forthcoming.

Based on these facts, the Board concluded that the company's payments to the non-striking union members interfered with the employees' right to strike in violation of § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). The Board also found that Rubatex violated § 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), by making the payments without prior negotiation with the union and by failing to furnish the union with the information it requested. As a remedy for the 8(a)(1) violation, the Board ordered the company to pay $100 to each of the union employees who engaged in the strike and $75 to each of the union members who received only $25 for their work during the strike, plus interest. Rubatex was required, in addition, to cease and desist from the unfair labor practices found, to post a notice to that effect at its Bedford plant, and to notify the Regional Director of the steps it had taken to comply with the Board's order.

II.

We deal first with the violations found by the Board. Section 8(a)(1) of the National Labor Relations Act declares it an unfair labor practice for an employer to interfere with rights guaranteed in § 7 of the Act, and § 7 guarantees employees the right, generally, to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Not only is a strike one such concerted activity, but it has also been accorded special deference in the enactment of federal labor laws. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-235 (1963). Accordingly, the Supreme Court has held that the award of additional seniority to striker replacements and non-strikers interfered with an employee's right to strike in violation of § 8(a)(1). *Id.* at 235-36.

In Aero-Motive Manufacturing Co., 195 NLRB 790 (1972), *enf'd*, 475 F.2d 27 (6 Cir. 1973), the Board applied the rationale of *Erie Resistor* to post-strike payments to

non-striking union employees. In the Board's view, by distinguishing "solely on the basis of who engaged in protected, concerted activity and who did not," such payments "not only created a divisive wedge in the work force, but also clearly demonstrated for the future the special rewards which lie in store for employees who choose to refrain from protected strike activity." *Id.* at 792. As a result, the Board concluded that the payments tended to inhibit the free exercise of the employees' right to strike contrary to § 8(a)(1).

We agree with the Board's determination in *Aero-Motive* and in the instant case that the grant of special benefits to union members who have chosen not to strike unlawfully interferes with the right of those and other employees to strike in the future. In so holding, we are unpersuaded by Rubatex's argument that any adverse impact which the post-strike payments might have on future union activity is purely speculative and insubstantial. The sum of $100 is not such a small amount that company employees will not think twice about participating in a future strike. Similarly, that only thirteen of the company's 830 union employees were rewarded is irrelevant in view of the fact that every employee who decided not to strike received a bonus. Nor are the company's employees likely to forget the special treatment accorded non-strikers in the three-year period before the new collective bargaining agreement is due to expire. Finally, no evidence has been presented that the union has imposed internal sanctions upon the thirteen members who did not participate in the strike.

Rubatex contends that the preservation of its reputation for fairness and the continuation of its operations constituted substantial business justifications for the payments. To the contrary, because they were not announced until after the strike, the payments were clearly not designed to satisfy any antecedent promises to the non-striking employees or to obtain sufficient workmen to operate the Bedford plant. Moreover, any such business justifications, if legitimate, would be

insufficient to outweigh the employees' interest in uninhibited strike activity. *See Erie Resistor,* 373 U.S. at 236-37; *Aero-Motive,* 195 NLRB at 792.

III.

Under § 8(a)(5) of the NLRA, an employer commits an unfair labor practice by refusing to bargain collectively with the representative of his employees. Collective bargaining is defined in § 8(d) of the Act as the duty to confer in good faith with respect to wages, hours, and other terms and conditions of employment. Here it is undisputed that Rubatex failed to bargain with the union about the bonus prior to its implementation.

To avoid the sanction of § 8(a)(5), Rubatex advances two arguments, but we are persuaded by neither. First, the company contends that an employer has no duty to bargain over gifts that are unrelated to employee services. But the letter accompanying the payment of the bonuses indicated that they were given "for the employees' effort in keeping the plant in operation during the course of the strike." In addition, the union employees who worked throughout the entire strike received $100, whereas those who worked proportionately less time received $25. Rubatex argues, second, that it would be futile to require an employer to bargain over payments which the union would not accept. Yet, as noted in *Aero-Motive,* 195 NLRB at 792, notice to the union would at least have brought the illegality of the company's action to light and perhaps have motivated Rubatex to seek alternatives in an effort to avoid litigation.

An employer also violates § 8(a)(5) by failing to provide information that is needed by the bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Corp.,* 385 U.S. 432, 435-36 (1967); *Aero-Motive, supra* at 792. During the regular meeting following the payments, the union representative asked how the bonus was computed and the company's agent responded that this was not a union matter. When the union suggested that some of its

members received payments, the company said it would check. The discussion ended with the union's observation that, for purposes of company bonuses, strikers should not be differentiated. Although other subjects were discussed at the meeting, we think that this exchange gave Rubatex sufficient notice that the union desired information concerning the bonus. Nor was the union obligated to repeat its request. *See Aero-Motive, supra* at 792. Consequently, when the company failed to produce the requested information, it engaged in a separate violation of § 8(a)(5).

IV.

The propriety of the remedy adopted by the Board presents greater difficulty. The objective is to restore the statutorily required equality of treatment as between those employees who engaged in concerted activities and those who did not, and not simply to punish an offending employer. In the formulation of a remedial order, the Board has broad discretion, and only where its effect is patently an attempt to accomplish an end other than that within the policy of the Act will the order be set aside. *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 216 (1964); *NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344, 346-47 (1953); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194-95 (1941).

For its violation of § 8(a)(1), Rubatex was ordered to pay $100 to each striker and $75 to each of the non-strikers who had received only $25, plus interest. A similar remedy was imposed in *Aero-Motive,* where the Board required the offending employer to pay $100 to the strikers who had not been given the $100 bonus paid to non-strikers. 195 NLRB at 793. The Board's order in *Aero-Motive* was enforced by the Sixth Circuit, which noted that the Board had broad discretion in formulating remedies and that there appeared to be no practical alternative to the relief prescribed. 475 F.2d at 28.

As we see it, the company's conduct in the instant case gave rise to three possible remedies: a cease and desist order alone, rescission of the bonus, and payment of the bonus to those who did not receive it. A cease and desist order, even if posted, might well be ineffective in dispelling the apprehensions of those employees who are aware that non-strikers were treated more favorably in the past and know of no restriction on the company's ability to engage in the same behavior in the future. Rescission, on the other hand, may be impractical at this late date and may create greater discord among the employees than currently exists as a result of the company's unlawful action. Payment of an equivalent bonus to the striking employees would seem to be the most effective and least disruptive of the alternatives, as far as the employees are concerned. However, it requires Rubatex to pay the substantial sum of $82,000 ($100 to each of the 817 union employees who participated in the strike and $75 to each of the four union members who were given only $25), plus interest.

Since no one of these three remedies is completely satisfactory, we are unable to hold that the Board abused its discretion in adopting the third alternative. It is true that the sum required to be paid is not inconsequential; yet, the record does not reflect whether payment of the sum would have a substantial adverse effect on the company.[2] Absent such evidence, we cannot say that the payment prescribed by the Board was excessive.

ENFORCEMENT GRANTED.

---

[2] Since there were 830 employees in the bargaining unit, the sum of $82,000, plus interest, is probably equivalent to the payroll for the unit for only several days. The bonus voluntarily paid by Rubatex to non-union or supervisory employees who worked during the strike amounted to $24,225. By these measures, the sum of $82,000 does not seem unduly burdensome.

HARVEY, District Judge, concurring in part and dissenting in part:

I would agree with the majority that the acts in question of representatives of Rubatex Corporation amount to a violation of §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act. While I would also agree that the injunctive relief ordered by the Board was appropriate under the circumstances here, I would not grant enforcement of that part of the Board's order requiring Rubatex to pay the substantial sum of $82,000 to 821 union employees because of the payment of merely $1,000 to thirteen union members who worked during the strike.

Undoubtedly, the Board has broad discretionary authority to fashion an appropriate remedy to purge unfair labor practices. However, the Supreme Court has recognized that the Board's power is not limitless, that the particular remedy must be appropriate under the situation which calls for redress, and that the remedy may not be oppressive or punitive as applied to the particular circumstances of a case. *NLRB v. District 50, UMW,* 355 U.S. 453, 458 (1958); *Carpenters' Local 60 v. NLRB,* 365 U.S. 651, 655 (1961). The majority has cited decisions of the Supreme Court indicating that an order of the Board will be set aside only where its effect is patently an attempt to accomplish an end other than that within the policy of the Act. *E.g., Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 216 (1964). This standard of review was first articulated in *Virginia Electric Co. v. NLRB,* 319 U.S. 533, 540 (1943). Nevertheless, since *Virginia Electric Co.,* the Supreme Court has not hesitated to set aside an order of the Board which it found to be punitive rather than remedial. *NLRB v. District 50, UMW, supra; Carpenters' Local 60 v. NLRB, supra.*

The strike in this case began on September 1, 1976 and ended on October 25, 1976, when a new collective bargaining agreement was executed. Rubatex was able to continue to operate during the strike, and thirteen members of the union chose to work along with certain

non-union employees and supervisory personnel. When the company a month later decided to pay a bonus to employees who had worked during the strike, it determined that the thirteen union members who chose to work should also receive the bonus along with non-union employees.

The illegality here arose as a result of the bonus payments to the union members, nine of whom received $100 each and four of whom received $25 each. Because of the payment of merely $1,000 to thirteen members of the union, the Board, besides entering a cease and desist order, has required that the company pay $100 to each of the 817 union employees who engaged in the strike and $75 to each of the four union members who had received only $25 for their work during the strike, plus interest. The company has therefore been ordered to pay the substantial sum of $82,000,000 plus interest. In my opinion, this part of the remedy is oppressive under the circumstances of this case and amounts to the imposition of a punitive fine.

I would agree with the majority that rescission of the bonus is not a practical remedy at this late date, but I do not agree that the payment of an equivalent bonus is a proper alternative. In my opinion, the appropriate remedy here would have been the entry of the injunctive relief alone. That portion of the Board's order requires the company to cease and desist from the unfair labor practices in question, to post a notice to that effect at its plant in Bedford, Virginia, and to notify the Regional Director of the steps it had taken to comply with the Board's order. Such a remedy would have adequately inhibited any future unfair labor practice of the type involved here. It would have been quite apparent to employees from the notice posted that if Rubatex at any time in the future paid members of the union a bonus for working during a future strike, the company could be cited for contempt and then a punitive fine could be imposed.

As the majority opinion notes, a similar remedy was imposed by the Board in *Aero-Motive Manufacturing*

Co., 195 NLRB 790 (1972), *enforced*, 475 F.2d 27 (6th Cir. 1973). However, different circumstances were involved there, and the impact of the monetary portion of the Board's order was much less onerous. In *Aero-Motive*, the employer had paid $4,000 to non-strikers and was required by the Board to pay $7,200 to the strikers. Even so, two members of the Sixth Circuit panel in that case voted to enforce the monetary portion of the order "reluctantly" (475 F.2d at 28), while Chief Judge Phillips dissented in part and voted to deny enforcement of that portion of the Board's order which would require payments to the strikers.

I do not find it significant that Rubatex did not produce evidence before the Board indicating that the payment of $82,000 would have a substantial adverse effect on company earnings. $82,000 is concededly a substantial sum, particularly when considered in relation to the $1,000 paid here as bonuses to the non-striking members of the union. Whether Rubatex is a large or a small company and whether or not it operates profitably, the Board's order requiring the payment of this large sum is in my opinion punitive under the circumstances of this case.

At some point, an order of the Board requiring a violator of the Act to pay substantial sums becomes oppressive and punitive in nature. The Board is simply not free to set up any system of penalties which it deems adequate to deter prospective violators of the Act. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). In balancing all the factors, I believe that the line has been crossed here and that the entry of the cease and desist order alone would be sufficient to correct the illegality under the particular circumstances of this case.

For these reasons, I would deny enforcement of that portion of the Board's order which requires the company to pay $82,000, plus interest, to members of the union.

235 NLRB No. 113

D—3638
Bedford, Va.

United States of America

Before The National Labor Relations Board

Rubatex Corporation
and
United Rubber, Cork, Linoleum & Plastic Workers of America, Local 240, AFL-CIO

Case 5—CA—8430

DECISION AND ORDER

Upon a charge filed on February 22, 1977, by United Rubber, Cork, Linoleum & Plastic Workers of America, Local 240, AFL—CIO, herein the Union, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 5, issued a complaint and notice of hearing on March 31, 1977, against Rubatex Corporation, herein Respondent. The complaint alleged that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by conduct hereinafter specified. Respondent filed an answer in which it denied the commission of the alleged unfair labor practices.

On May 27 and 31, 1977, the General Counsel, Respondent, and the Union executed a stipulation of facts in which they waived a hearing before an Administrative Law Judge and agreed to submit the case directly to the Board for findings of fact, conclusions of law, and the entry of an appropriate order,

based upon a record consisting of the stipulation and the exhibits attached thereto.

On August 17, 1977, the Board approved the stipulation of the parties and ordered the case transferred to the Board, granting permission for the filing of briefs. Thereafter both the General Counsel and Respondent filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the basis of the stipulation, the briefs, and the entire record in this case, the Board makes the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent, a Virginia corporation, is engaged in the manufacture of rubber products at its Bedford, Virginia, facility. During the preceding 12 months, a representative period, Respondent sold and shipped, in interstate commerce, products valued in excess of $50,000 to customers located outside the Commonwealth of Virginia.

Respondent admits, and we find, that Respondent is an employer engaged in commerce and in operations affecting commerce as defined in Section 2(2), (6), and (7) of the Act. We also find that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. The Labor Organization

Respondent admits, and we find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Issues

This case presents three issues: (1) whether Respondent violated Section 8(a)(1) of the Act by the payment of a cash bonus to employees who crossed the picket line

established by the Union and reported for work; (2) whether Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally paying the aforementioned bonus to employees without notice to, or bargaining with, the Union; and (3) whether Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with requested information concerning the bonuses.

IV. The Unfair Labor Practices

A. *Facts*

Respondent has recognized, and executed a series of collective-bargaining agreements with, the Union as the representative of all Respondent's production and maintenance employees.[1]

The then current collective-bargaining agreement between Respondent and the Union terminated on August 31, 1976.[2] Negotiations for a new contract reached an impasse and a strike began on September 1, at which time there were approximately 830 employees in the bargaining unit. Respondent continued operations throughout the strike using supervisory personnel, nonbargaining unit employees, and 13 bargaining unit members who chose to work during all or part of the strike.

A new collective-bargaining agreement and settlement of the strike was reached on October 25. Bargaining unit employees returned to work on October 26.

On or about November 22, without prior notice to or bargaining with the Union, Respondent made monetary payments to all employees who worked during the

[1] As defined in the recognition clause of the collective-bargaining agreements between Respondent and the Union, the unit encompasses all "production and maintenance employees, excluding office clerical employees, guards, professional employees, laboratory workers, quality control workers, over-the-road truck drivers, the Traffic Manager or anyone assigned to the Traffic Department, and supervisors as defined in the National Labor Relations Act."

[2] All dates hereinafter are in 1976, unless otherwise indicated.

strike, including thereunder the 13 aforementioned employees. Of 244 nonunit and/or supervisory employees, 240 received $100 each, 3 received $50 each, and 1 was paid $75. Of the 13 bargaining unit employees, the 9 who worked throughout the entire strike received $100 each and the 4 who worked proportionately less time than the others received $25 each. No bonus payments whatever were made to the approximately 817 unit employees who fully participated in the strike.

A letter dated November 22, accompanying each payment and signed by Respondent President W. C. Walters, stated, *inter alia,* that the payment was a small token of Respondent's appreciation for the employees' effort in keeping the plant in operation during the course of the strike.

On or about November 30, at a regular meeting between Respondent and the Union, Union President Thomas Rawlings and Personnel Manager Jack Coleman discussed, *inter alia,* the bonus payments. According to the minutes of this meeting, Rawlings queried how the $100 bonus was "arrived at" and Coleman replied he did not think this was a bargaining unit matter. Rawlings noted that some bargaining unit members received bonuses and Coleman responded that he would "check this." Rawlings then indicated the Union's view that on the payment of bonuses there should be no difference between employees who went on strike and those who did not. Respondent did not thereafter furnish the Union with any information relative to the disputed bonus payments.

B. *Contentions of the Parties*

The General Counsel contends that the present matter is controlled by the Board's decision in *Aero-Motive Manufacturing Company,* 195 NLRB 790 (1972), enfd. 475 F.2d 27 (C.A. 6, 1973). In that case, the union engaged in a strike in an effort to bring economic pressure on the employer to agree to a new collective-bargaining contract. Following the execution of a new

contract and the cessation of the strike, the employer, without bargaining with the union, granted a $100 bonus to each unit and nonunit employee who worked during the strike. Moreover, the employer failed to supply information requested by the Union about the bonuses. The Board concluded that the employer unlawfully interferred with, restrained, and coerced the employees by granting the bonuses and unlawfully failed to bargain in good faith by implementing the bonuses without negotiating with the union and by failing to supply the requested information.

Respondent contends that the adverse impact of its actions upon the Section 7 rights of the employees was at a *de minimis* level because: (1) the amount of the bonuses was trivial when compared with the 8 weeks' wages received by unit employees who worked during the strike; (2) the effect of the bonuses on any future strike activity is trivial and speculative; (3) any alleged divisive effect of the bonus is *de minimis* or nonexistent since bonuses were awarded to only 13 of 830 unit employees; (4) any future adverse effect of the bonuses is obviated by the Union's right to impose internal union discipline on members who cross picket lines; (5) the alleged gratuities were a reward for loyalty to Respondent during the course of the strike and, therefore, justified; and (6) the bonuses were gifts and, therefore, not terms of employment subject to negotiation. Finally, Respondent contends that the General Counsel's requested remedy — the payment of $100 bonuses to all unit employes — is punitive and unwarranted.

C. *Discussion and Conclusions*

We considered the lawfulness of bonus payments to employees who cross picket lines and work during a strike in *Aero-Motive Manufacturing Company, supra.* The union there represented a bargaining unit of production and maintenance employees at the sole company facility. During the course of an economic strike which lasted for 2-½ months, there was damage to the vehicles of some strikers and non-strikers,

damage to the homes of some non-strikers, and minor damage to company facilities. On the day after the execution of a new collective-bargaining contract and the termination of the strike, the company granted a bonus of $100 each to all employees (unit employees, office clerical employees, and supervisors) who crossed the picket line and worked during the strike as compensation for risking their "health, property, and peace of mind." While the company decided to give the bonuses during the course of the strike, there was no announcement thereof until the day after the strike ended. Shortly thereafter the union requested information with respect to the bonus payments, but the company failed to provide it.

On the basis of the foregoing facts, we found that the company violated Section 8(a)(1) of the Act by granting the bonuses, reasoning that they were grants of special benefits to employees who refrained from engaging in concerted activity and a denial of such benefits to employees who chose to engage in such protected activity. While not granted until after the strike ended, the Board found that the bonuses disadvantaged the striking employees *vis-a-vis* the nonstrikers and that this would have the impact of discouraging employees from engaging in protected activities in the future.

Aero-Motive is dispositive of the instant matter. The striking employees became disadvantaged relative to their non-striking colleagues simply because they engaged in protected strike activity. Respondent's contention that the amount of the bonuses was trivial, compared to the total pay received by even the lowest paid employees who worked during the strike, misses the point. Regardless of the amount of the bonuses, the fact remains that employees who had not participated in the strike were singled out and granted a benefit which was denied employees who had. Cf. *Swedish Hospital Medical Center,* 232 NLRB No. 4 (1977).

Moreover, regardless of how Respondent characterized these payments in the letters it sent to the bonus recipients, we believe their principal impact will be to

discourage employees from engaging in protected activity in the future. We cannot agree with Respondent's assertion that this effect is trivial and speculative. Nor can we agree with Respondent's argument that any future adverse effect of the bonus payments is obviated by the Union's right to discipline members for crossing the picket line. Such disciplinary measures are, in part, illusory since nonmember unit employees may cross the picket line and work with immunity from union discipline. In any event, Respondent cannot escape liability for activities proscribed by the Act simply because there are alternative means for dealing with such activities.

Respondent's argument that the payments were a reward for loyalty and therefore justified cannot withstand scrutiny. Whatever Respondent's subjective motivation for granting the bonuses, the objective impact of this conduct nevertheless was to render non-striking employees $100 richer than their striking colleagues simply because the latter engaged in protected activity. As noted, this object lesson may weigh in the balance when an employee is considering in the future whether or not to engage in protected concerted activity. Accordingly, we find that Respondent's payment of the bonuses to be violative of Section 8(a)(1) of the Act.

In *Aero-Motive* we found, additionally, that the company violated Section 8(a)(5) and (1) of the Act by granting the bonuses unilaterally without prior negotiations with the union. In the instant matter Respondent also failed to bargain with the Union about the bonuses prior to their implementation. It is no defense that as the payment was illegal there was nothing Respondent could lawfully bargain about, since discussion of the proposal might have raised the issue of its legality and led to its rejection by Respondent or to alternative proposals. *Aero-Motive Manufacturing Company, supra.* Also, Respondent's contention that the bonuses were gifts unrelated to the terms and conditions of employment must fail since the letter accompanying the payment of the bonuses indicated that they were

given "for the employees' effort in keeping the plant in operation during the course of the strike." Clearly, the payments were additional compensation for services and, therefore, were terms and conditions of employment about which Respondent is obliged to bargain. Accordingly, we find that Respondent's action in granting the bonuses unilaterally, and without notice to or bargaining with the Union, violated Section 8(a)(5) and (1) of the Act.

Finally, in *Aero-Motive* we found that the company violated Section 8(a)(5) and (1) of the Act by failing to supply the union with requested information concerning the bonus. Respondent here failed to supply the Union information with respect to the payments, stating it was not a bargaining unit matter and had nothing to do with strike activities. But Respondent's letter accompanying the payments shows that the bonuses were paid to the employees, including bargaining unit employees, precisely on the basis of whether or not they had crossed the picket line and worked during the strike. Thus, it was an issue over which Respondent was obliged to bargain with the Union. Accordingly, we find that Respondent's refusal to supply the requested information was also violative of Section 8(a)(5) and (1) of the Act.

Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, we shall order it to cease and desist therefrom in the future.

With respect to the 8(a)(5) violation concerning the refusal to furnish information relative to the bonus payments, we are limiting our Order to one requiring Respondent to cease and desist from like conduct in the future since, with respect to the instant bonus payments, the matter is now moot. Full information about the bonuses will be required to be provided to our compliance officers in order to effectuate the remedy hereinafter provided.

Having found the payment of the bonus to violate Section 8(a)(1), we return now to the question of providing an effective remedy for this violation. Rescission would appear to be inappropriate and impractical and would, we believe, create greater discord among the employees than currently exists as a result of Respondent's illegal action. The only practical method, therefore, of restoring the statutorily required equality of treatment as between employees who engaged in concerted activity and those who refrained therefrom is to require the payment of an equivalent amount to the employees who did engage in the concerted activity and who were denied the payment.[3]

We shall therefore require Respondent to pay all unit employees who were employed at the conclusion of the strike or who were recalled to work within 30 days thereafter, and who did not receive the bonus payment, the sum of $100 each; and the sum of $75 each to the unit employees who have already received a $25 bonus,[4]

[3] We cannot agree with Respondent's contention that this remedy is burdensome and punitive. Respondent must make employees whole for its discrimination against them for participating in the strike. There is nothing burdensome or punitive about this since we order no payment beyond what is necessary to restore equality between those unit employees who participated in the strike and those who did not. In *Aero-Motive Manufacturing Company, supra,* we granted a similar remedy requiring payments of $100 each, plus interest, to strikers who did not receive the bonus previously paid nonstriking employees. The United States Court of Appeals for the Sixth Circuit granted enforcement of the Board's Order in its entirety, with the Chief Judge stating that he would not enforce the portion of the Order which directed the respondent to make the $100 payments — but solely on the basis of the violence and threats to the persons and property of nonstrikers which occurred during the strike period. Here, there is no evidence or allegation whatever to indicate the existence of any similar situation during the strike at Rubatex. Also, in *Swedish Hospital Medical Center, supra,* we ordered the respondent to grant 379 former strikers the same "day off" with pay which had previously been given to nonstriking employees.

[4] The employees who received only $25 were those who worked during but a part of the strike. Inasmuch as these

with interest on all payments to be computed in the manner prescribed in *Florida Steel Corporation,* 231 NLRB No. 117 (1977).[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Rubatex Corporation, Bedford, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting special bonuses in compensation to employees who refrain from lawful strike activity.

(b) Refusing to bargain collectively with United Rubber, Cork, Linoleum & Plastic Workers of American, Local 240, AFL-CIO, in good faith by unilaterally granting bonuses to some bargaining unit employees, and by refusing to provide information relevant to the payment of bonuses to employees in the bargaining unit.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Pay $100 to each of the unit employees who engaged in the 1976 strike against Respondent, who did not receive the $100 bonus paid to other employees, and who were recalled to work within 30 days after October 26, 1976; and pay $75 to each of the unit employees who has already received a $25 bonus payment, plus interest

employees were discriminated against for not working during the entire strike, they also must be made whole by an additional payment of $75 to each.

[5] See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

on all such payments in the manner prescribed in the Remedy.

(b) Post at its Bedford, Virginia, plants copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. April 10, 1978

John H. Fanning,
Chairman.

Howard Jenkins, Jr.,
Member.

Betty Southard Murphy,
Member.

(Seal)

NATIONAL LABOR
RELATIONS BOARD

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT grant special bonuses in compensation to employees who refrain from lawful strike activity.

WE WILL NOT refuse to bargain collectively with United Rubber, Cork, Linoleum & Plastic Workers of American, Local 240, AFL-CIO, in good faith by unilaterally granting bonuses to some bargaining unit employees, and by refusing to provide information relevant to the payment of bonuses to employees in the bargaining unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL pay $100, plus interest, to each employee in the bargaining unit who engaged in the 1976 strike, who did not receive the $100 bonus paid on or about November 22, 1976, to other employees, and who was recalled to work within 30 days after October 26, 1976; and WE WILL pay $75, plus interest, to each bargaining unit employee who received a $25 bonus on or about November 22, 1976.

RUBATEX CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered,

defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Edward A. Garmatz Federal Building, 101 West Lombard Street, Ninth Floor, Baltimore, Maryland 21201, Telephone 301-962-2772.

National Labor Relations Act, Section 8(a)(1), 29 U.S.C. § 158(a)(1).

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;
>
> * * * * * *

National Labor Relations Act, Section 10(c) 29 U.S.C. § 160(c):

> The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not

the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.